Supreme Court, U.S.
FILED

02 1349 MAR 11 2003

No. 02-

IN THE
Supreme Court of the United States

JOSEPH MERLINO, a/k/a SKINNY JOEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT ~~OF CERTIORARI~~

STEPHEN M. FELDMAN
Counsel of Record
CHRISTOPHER D. WARREN
1604 Locust Street
Philadelphia, PA 19103
(215) 546-2604

Attorneys for Petitioner

179517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

68 pp

QUESTION PRESENTED

Does the Fifth Amendment permit the government to retry a defendant in a federal racketeering case on a predicate act of homicide that a prior jury found was not proven if an erroneous jury instruction gives rise to the possibility that the verdict in the first trial was not unanimous?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
I. The Decision of the Court of Appeals Is Inconsistent With This Court's Prior Precedent	10
II. The Decision of the Court of Appeals Impermissibly Allows the Government to Impeach Adverse Verdicts in Criminal Cases, Creates a Test that a Defendant in a Criminal Case Can Never Satisfy, and Undermines the Concept of Finality	17
Conclusion	22

TABLE OF CITED AUTHORITIES

Page

Cases:

Ashe v. Swenson, 397 U.S. 436 (1970) 10, 12, 13, 14

Commonwealth v. Anthes, 71 Mass. 185 (Mass. 1855) 18

Fong Foo v. United States, 369 U.S. 141 (1962) 14, 15, 16

Illinois v. Somerville, 410 U.S. 458 (1973) 13

Sanabria v. United States, 437 U.S. 54 (1978) 15, 16, 20

Sparf v. United States, 156 U.S. 51 (1895) 17

Turner v. Arkansas, 407 U.S. 366 (1972) 10

United States v. Castro, 629 F.2d 456 (7th Cir. 1980) 11

United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992), *cert. denied*, 510 U.S. 856 (1993) 11-12

United States v. D'Angelo, 598 F.2d 1002 (5th Cir. 1979) 18

United States v. Garcia, 78 F.3d 1517 (11th Cir. 1996) 11

Cited Authorities

Page

United States v. Homer, 411 F. Supp. 972 (W.D. Pa.), *aff'd*, 545 F.2d 869 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) 18

United States v. Powell, 469 U.S. 57 (1984) 17, 21

United States v. Romeo, 114 F.3d 141 (9th Cir. 1997) 11

United States v. Scott, 437 U.S. 82 (1978) 15, 16

United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996) 6

United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997) 11

United States Constitution:

Fifth Amendment ..... i, 2

Statutes:

18 U.S.C. § 1959(a) 4, 12

18 U.S.C. § 1961, *et seq.* 2

18 U.S.C. § 1962(c) 3

18 U.S.C. § 1962(d) 2

28 U.S.C. § 1254(1) 2

Cited Authorities

Page

Rule:

Fed. R. Evid. 606(b) 19, 20, 21

Other Authorities:

Restatement (Second) of Judgments § 1 (1982) 13

Restatement (Second) of Judgments § 13 (1982) 13

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed November 8, 2002 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of New Jersey Dated And Filed October 16, 2001 ..... 20a

Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Panel Rehearing And Rehearing En Banc Dated December 11, 2002 ..... 37a

No. 02-

IN THE

Supreme Court of the United States

JOSEPH MERLINO, a/k/a SKINNY JOEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Merlino respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 310 F.3d 137 and is contained in the Appendix hereto. The opinion

of the United States District Court for the District of New Jersey denying petitioner's motion to dismiss the superseding indictment is unreported and is contained in the Appendix. (Citations to the Appendix are made as follows: App. 1a, etc.).

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 2002 and a timely petition for rehearing was denied on December 11, 2002. This petition for a writ of certiorari was filed within 90 days of the date that rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

STATEMENT OF THE CASE

The factual and procedural background of this case is uncomplicated and can be summarized succinctly. In January of 2001, a grand jury sitting in the Eastern District of Pennsylvania returned a superseding indictment which charged petitioner and several co-defendants with violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*. In Count One, the government alleged that petitioner conspired from March of 1990 to March of 2000 to participate in the affairs of an enterprise (the Philadelphia La Cosa Nostra) through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).

Count Two charged petitioner with substantive participation in the affairs of the enterprise during the same time period in violation of 18 U.S.C. § 1962(c). As for the predicate offenses that constituted the pattern of racketeering activity, Counts One and Two charged petitioner with the commission of twenty-one racketeering acts that ranged from murder to the possession of stolen baby formula.

The trial of the Pennsylvania case began in March of 2001 and continued for a period of four months. Following closing argument and the district court's charge, the jurors were given a set of special interrogatories which required them to identify, by placing an appropriate check mark, which racketeering acts were proven by the government and which ones were not. Two days after the jury began deliberations, it submitted a question to the district court which stated:

> Racketeering Acts. Once we determine that the defendant has committed one unlawful collection of debt or two or more racketeering acts, do we have to decide proven or not proven on all the racketeering acts?

(310 F.3d at 140; App. 5a). The district court answered this question in the affirmative and the jury resumed deliberations. Two days later, the jury submitted another question to the district court which read:

> If, on a given racketeering act that has no bearing on the count decision we cannot come to a unanimous decision, is it within the law to unanimously decide that the act is 'not proven'?

(*Ibid.*). Over objection by the government, the district court also answered this question in the affirmative.

The jury thereafter returned guilty verdicts on the racketeering offenses charged in Counts One and Two. With respect to the twenty-one racketeering acts, the jury found in response to the special interrogatories that the government had proven six of these acts under Count One and five of these acts under Count Two. As for the remaining racketeering acts, the jurors found that the government failed to prove that petitioner committed those offenses and they made appropriate check marks on the verdict sheet. Included within this latter category were two racketeering acts which charged petitioner with conspiracy to murder and causing the death of a reputed Mafia member named Joseph Sodano in violation of New Jersey law.[1]

Approximately one month after the jury returned its "not proven" verdicts in the Pennsylvania case, the government obtained a superseding indictment in a racketeering case that was pending in New Jersey and charged petitioner with the commission of violent crimes in aid of racketeering activity in violation of 18 U.S.C. § 1959(a). Like the indictment that had been the subject of the Pennsylvania trial, the New Jersey indictment also charged petitioner, albeit under a different section of the racketeering statutes, with conspiring to murder and causing the death of Joseph Sodano in violation of state law. In response to this indictment, petitioner filed a motion to dismiss the charges on the ground that the Pennsylvania jury's finding that the government failed to prove the Sodano racketeering acts barred a retrial of those offense under the collateral-estoppel component of the Double Jeopardy Clause. The district court denied the motion based upon its determination

---

1. The racketeering acts that the jury found were proven by the government included conspiracy to commit extortion, bookmaking, and stolen property offenses for which petitioner was sentenced to a term of 14-years imprisonment.

that the Pennsylvania jury's question regarding unanimity coupled with the district court's supplemental instruction indicated that the jurors were deadlocked and thus the "not proven" verdicts set forth on the special interrogatories were more analogous to a "hung jury" than an acquittal.[2]

Petitioner then took an interlocutory appeal in which he again pressed the argument that relitigation of the Sodano murder and conspiracy offenses was barred by collateral estoppel. A divided panel of the United States Court of Appeals for the Third Circuit rejected this contention based upon the conclusion that petitioner had failed to prove that the jury in the Pennsylvania case unanimously resolved the Sodano predicate acts in his favor. (310 F.3d at 141-42; App. 8a). According to the majority opinion, a defendant in a criminal case cannot bar a retrial on the basis of collateral estoppel unless he first shows that the factual issue that he seeks to foreclose from consideration was unanimously decided in his favor:

> In *Ashe v. Swenson* [397 U.S. 436 (1970)] the Supreme Court held that the Double Jeopardy Clause prohibits relitigation of an issue when the jury has decided that issue in a defendant's favor by a 'valid and final judgment.' *Id.* at 443; *accord United States v. Console*, 13 F.3d 641, 664 (3d Cir. 1993). A 'final judgment' in favor of a criminal defendant is an acquittal, *United States v. Lanoue*, 137 F.3d 656 (1st Cir. 1998), and an acquittal, in order to bar future litigation, must be unanimous; a 'hung jury' does not bar future prosecutions. *See Illinois v. Somerville*,

---

2. The district court reached this conclusion despite the fact that the last sentence that appeared on the verdict sheets was "[t]he unanimous verdict of the jury is as indicated above."

> 410 U.S. 458, 463 (1973). Because a criminal defendant bears the burden of proving that litigation of an issue is foreclosed, *Dowling v. United States*, 493 U.S. 342, 350-1 (1990); *United States v. Console*, 13 F.3d at 665 n.28, it follows, under the circumstances in which a unanimous vote is required, the defendant can claim the benefit of collateral estoppel only if he can prove that the jury vote was in fact unanimous.

(310 F.3d at 142; App. 9a). Since the unanimity question from the jurors in the Pennsylvania case and the district court's answer gave rise to the possibility that the verdict on the Sodano predicate acts was less than unanimous, the majority held that petitioner had failed to carry his burden and affirmed the district court's order. (310 F.3d at 142-43; App. 10a-11a).[3]

In dissent, Judge Nygaard framed the issue in this case as "whether we must accept the jury's finding of 'Not Proven' on its face, or whether we are empowered to look behind its finding and conclude that it is not clear whether the jury actually reached a unanimous decision on this critical predicate act." (310 F.3d at 144; App. 14a) (Nygaard, J., dissenting). Judge Nygaard concluded that the jury's stated

---

3. The majority apparently accepted the proposition that a not proven verdict on a racketeering act would bar the relitigation of that act in a subsequent trial. (310 F.3d at 143; App. 11a) ("Only the first interpretation of the jury note would bar the current case against Merlino because only the first is a unanimous acquittal and only the first resolves the issue Merlino wants to preclude in the New Jersey prosecution"); *see also United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) (jury's acquittal on substantive charges collaterally estopped government from recharging those offenses as predicate acts in a RICO count)

decision in the Pennsylvania case was binding and that any attempt to use its questions or the district court's supplemental instruction to strip the verdict of its validity would be improper. Specifically, Judge Nygaard stated:

> I submit that looking behind jury verdicts to reconstruct the jury's thinking, or attempting to determine how it may have reached a consensus, is pure speculation and contravenes our fundamental constitutional heritage of treating jury verdicts as unimpeachable. The government claims that because of the judge's supplemental instructions, the jury probably was not unanimous when it found that the government failed to prove the murder-based predicate acts. But we do not know how the jury voted after the judge issued the second supplemental instruction, and we should not pretend that we do. We only know that it decided that this predicate act was not proven.

(*Ibid.*).

Judge Nygaard also reasoned that there was no need to analyze or review the questions submitted by the jurors or the district court's instructions to divine what factual issues were resolved in petitioner's favor because the answers to the special interrogatories removed any doubt as to what the jury decided. (310 F.3d at 144; App. 14a-15a) ("Here, the special verdict form clearly indicates how the jury resolved each issue. Put simply, the jury decided that the predicate acts were 'Not Proven.' I would accept that verdict as the jury's adjudication of the murder charges, and prohibit that issue from being raised against Merlino again"). And finally, Judge Nygaard recognized that at bottom the

government's real complaint in this case was that the district court's supplemental instruction was erroneous in that it permitted an acquittal even if the panel was not unanimous. (310 F.3d at 145; App. 16a-17a). That, Judge Nygaard reasoned, provided no basis to ignore the jury's verdict and retry petitioner:

> Appellee's argument boils down to this: the District Court gave an erroneous jury instruction that theoretically could have permitted the jury to say it was unanimous when it really was not. But, this argument goes nowhere. An acquittal may not be overturned based upon 'an egregiously erroneous foundation.' *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Sanabria v. United States*, 437 U.S. 54, 74 (1978) ('there is no exception permitting a retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' the legal rulings leading to that judgment might be').

(*Ibid.*).

REASONS FOR GRANTING THE WRIT

The rule of constitutional law that the Court of Appeals created and then applied in this case is unprecedented and conflicts with prior decisions from this Court. It has never been held or even suggested by this Court that a criminal defendant seeking to preclude a retrial on the grounds of collateral estoppel must go behind a facially-valid verdict and prove that the jury unanimously found in his favor on the factual issue that is the very subject of the verdict. Nor has this Court ever held or even intimated that a facially-

valid verdict in favor of a criminal defendant is invalid or non-final if the possibility exists that the jury was not unanimous. What this Court has held is that relitigation is prohibited if the ultimate issue that the defendant seeks to foreclose from consideration was determined by a valid and final judgment. Because such a judgment was entered in the Pennsylvania case, the Court of Appeals failed to apply this Court's precedent when it held that petitioner could be retried for the Sodano murder and conspiracy offenses. Additionally, this Court has also made it clear that legal errors which lead to an acquittal do not permit the government to reprosecute the defendant. Since that is the most that can be said about the verdicts that were entered in the Pennsylvania case, the Court of Appeals should have applied this Court's prior decisions and barred a second trial.

The decision of the Court of Appeals is also dangerously flawed because it lays waste to the principle that jury verdicts in criminal cases are not subject to impeachment. The Court of Appeals permitted the government to make use of a jury question and supplemental instruction to successfully support an argument that the jury in the Pennsylvania case was not unanimous when it returned the "not proven" verdicts on the racketeering acts. As Judge Nygaard recognized in his dissent, this was outright impeachment of the verdicts that were returned by the jury on the Sodano predicate acts. Moreover, after permitting the government to impeach the verdicts the Court of Appeals held that it was incumbent upon petitioner to show that the jury was unanimous before he could claim the benefit of collateral estoppel. This newly-created test, however, can never be satisfied because the rules of evidence bar the presentation of testimony or affidavits from jurors concerning their deliberations and the internal process that led to a verdict. And finally, the decision of the Court of Appeals will by extension permit a retrial in any

case in which legal error arguably caused an acquittal. Because such a rule of law is both unsound and would result in a serious erosion of the protections afforded by the Double Jeopardy Clause, this Court should grant certiorari in this case.

I. The Decision of the Court of Appeals Is Inconsistent With This Court's Prior Precedent

In a criminal case, the doctrine of collateral estoppel recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970) "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. To determine what issues were "necessarily" decided in the first trial, this Court stated in *Ashe* that the inquiry is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444. This Court also stated "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* Further, if the acquittal in a prior trial was the result of a general verdict, courts are required to examine the record of that proceeding, the pleadings, evidence, charge, and any other relevant information to determine what issues were necessarily resolved in the defendant's favor. *Id.*[4]

4. There are numerous cases in which *Ashe* has been held to bar the retrial of factual issues that were decided against the prosecution in a prior proceeding. *E.g.*, *Turner v. Arkansas*, 407 U.S. 366, 369-70 (1972) (defendant's acquittal of murder that was alleged to have been committed during the course of a robbery barred a (Cont'd)

Application of these principles to this case should have compelled a finding that petitioner could not be retried for the Sodano predicate acts. As the district court noted in the opinion denying petitioner's motion, the only issue that was contested by the parties in the Pennsylvania trial regarding those charges was whether Sodano was murdered on orders from petitioner and a cooperating witness (as the government claimed) or whether he was the victim of a robbery committed by others (as the defense claimed). (App. 23a). This dispute required the jury to decide whether the government had proven that petitioner conspired to murder Sodano and caused his death in violation of New Jersey law. The jury found against the government on these issues and returned special verdicts to that effect. Since the exact same underlying violations of state law that were litigated in the first trial are also essential elements of the offenses charged in the New Jersey case, *United States v. Concepcion*, 983 F.2d 369, 381

(Cont'd)
subsequent trial for the robbery offense); *United States v. Castro*, 629 F.2d 456, 465 (7th Cir. 1980) (collateral estoppel precluded government from introducing evidence in second trial regarding defendant's membership in drug conspiracy where persons involved in first and second conspiracies were encompassed within the same agreement and facts essential to conspiracy conviction in second trial were decided favorably to defendant in first trial); *United States v. Stoddard*, 111 F.3d 1450, 1457-60 (9th Cir. 1997) (defendant's acquittal on drug conspiracy charges collaterally estopped government in second trial from asserting that funds involved in narcotics offense should have been reported on income tax return); *United States v. Romeo*, 114 F.3d 141, 143-44 (9th Cir. 1997) (defendant's acquittal for possession of marijuana barred a retrial on charge that he imported marijuana); *United States v. Garcia*, 78 F.3d 1517, 1521-22 (11th Cir. 1996) (defendant's acquittal on drug offense barred a later trial for traveling in foreign commerce with the intent to facilitate the same drug offense).

(2d Cir. 1992) (§ 1959(a) requires proof "that the defendant committed the alleged crime of violence"), *cert. denied*, 510 U.S. 856 (1993), *Ashe* holds that any relitigation of those issues is barred by collateral estoppel and the charges should have been dismissed.[5]

To avoid this straightforward analysis, the Court of Appeals held that *Ashe* requires petitioner to prove that the jury unanimously resolved the Sodano predicate acts in his favor and that "the face of the verdict sheet [was] not alone sufficient" to discharge this burden. (310 F.3d at 142; App. 9a). This is contrary to *Ashe*. What this Court held in that case was that "when an issue of ultimate fact has once

---

5. As Judge Nygaard noted without contradiction by the majority, the "not proven" verdicts on the Sodano predicate acts were the functional equivalents of acquittals:

> The jury's decision on the murder-based predicate acts was the functional equivalent of a verdict on the stand-alone murder charge. *Apprendi v. New Jersey* holds that any fact that has the effect of increasing the maximum penalty permitted by law is an element of the offense, which must be submitted to the jury and proven beyond a reasonable doubt. 530 U.S. 466 (2000). If the jury had found that the murder-based predicate acts were proved, Merlino could have faced life imprisonment. The government was therefore obligated to prove a predicate act of murder beyond a reasonable doubt. Because a favorable verdict for the government on racketeering acts 4A and 4B would have been tantamount to a conviction for the Sodano murder and conspiracy offense, the converse should be true: the 'Not Proven' verdicts should be treated as acquittals for collateral estoppel purposes.

(310 F.3d at 145; App. 15a-16a) (Nygaard, J., dissenting).

been determined by a *valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443 (emphasis added). Thus, the question presented was whether a "valid and final judgment" was entered in the Pennsylvania case on the racketeering offenses that the predicate acts were incorporated into. According to the Restatement (Second) of Judgments § 1 (1982), a judgment is "'valid' when it has been rendered by a court of competent subject matter jurisdiction and the party against whom judgment has been rendered either has submitted to the jurisdiction of the court or has been afforded adequate notice," *id.*, and a judgment is "final" if it is "not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court." *Id.* § 13 comment b. The verdicts entered at the conclusion of the Pennsylvania trial obviously satisfy these definitions and *no court* has ever held that a party seeking to invoke collateral estoppel in a criminal case bears the additional burden of excluding the possibility that the jury was not unanimous.

The only case cited by the Court of Appeals in support of the proposition that "an acquittal, in order to bar future litigation, must be unanimous . . ." was *Illinois v. Somerville*, 410 U.S. 458 (1973). (310 F.3d at 142; App. 9a). That decision, however, did not involve a facially-valid verdict and dealt with the issue of whether a retrial was permissible when the trial court declared a mistrial because the indictment did not sufficiently charge a crime. 410 U.S. at 459. At no place in that or any other case did this Court ever state or even imply that finality and validity for purposes of collateral estoppel are contingent upon proof of unanimity. The Court of Appeals thus engrafted a requirement onto the collateral estoppel analysis that never existed prior to this case.

The Court of Appeals' use of the jury's unanimity question and the district court's supplemental instruction to pierce the face of the verdict is also unprecedented and conflicts with *Ashe*. While *Ashe* does state that reference can be made to "the pleadings, evidence, charge, and other relevant matter" to determine what issues were necessarily decided by the jury in a prior trial, 397 U.S. at 444, that remark was made in the context of a general verdict where the question at hand was what *factual* issues were resolved in the defendant's favor. *Id.* As Judge Nygaard noted, the jury's questions and the district court's instructions need not be examined to determine whether the *factual* issues that petitioner seeks to foreclose from consideration were decided in his favor because the answers to the special interrogatories demonstrate that they were. (310 F.3d at 144; App. 15a) (Nygaard, J., dissenting) (the reference in *Ashe* to examining the charge "makes sense for a general verdict, where it is difficult to determine which particular facts the jury actually decided. It makes no sense when we have a special verdict and we know exactly what the jury concluded"). Resort to jury questions and the charge was thus unnecessary in this case and to hold, as the Court of Appeals did here, that *Ashe* authorizes the use of such items to undermine the binding effect of a facially-valid verdict was a blatant misuse of that decision.

Furthermore, a review of cases in which this Court has barred retrials where an acquittal was the product of erroneous legal rulings demonstrates that proof of unanimity is not required. In *Fong Foo v. United States*, 369 U.S. 141 (1962), for example, the Court was confronted with a situation in which the district court ordered the jury to return verdicts of acquittal after hearing testimony from three government witnesses. 369 U.S. at 141-42. Since the jurors

never heard all of the evidence or reached a verdict following deliberations, it would have been impossible for the defendants to establish that the jury unanimously came to the conclusion that the government had failed to prove its case. Yet this Court nevertheless held that the verdicts in favor of the defendants were valid and binding even though they were "based upon an egregiously erroneous foundation." *Id.* at 143. And in *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978), the Court held that an erroneous evidentiary ruling which led to an acquittal on the basis of insufficient evidence was valid and binding for double-jeopardy purposes. Since the acquittal in *Sanabria* was granted by the district court, the defendant was obviously incapable of proving that the jury unanimously found in his favor. Nevertheless, this Court held that the "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* at 69.

The reason for this rule was summarized by this Court in *United States v. Scott*, 437 U.S. 82 (1978) as follows:

> A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal. What may seem superficially to be a disparity in the rules governing a defendant's liability to be tried again is explainable by reference to the underlying purposes of the Double Jeopardy Clause. As *Kepner* [*v. United States*, 195 U.S. 100 (1904)] and *Fong Foo* illustrate, the law attaches particular significance to an acquittal. To

> permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.' *Green* [*v. United States*], 355 U.S. [184], 188 [(1957)].

Id. at 91 (footnote omitted).

The Court of Appeals concluded that neither *Fong Foo* nor *Sanabria* were relevant in this case because they "hold that an erroneous legal foundation does not alter the binding effect of a unanimous acquittal." (310 F.3d at 143; App. 13a). This statement is plainly incorrect unless by "unanimous acquittal" the Court of Appeals was describing the type of judicially-coerced unanimity that led to the acquittal in *Fong Foo* or the "unanimous" decision by the district court to grant judgment of acquittal in *Sanabria*. Since that, however, is obviously not what the Court of Appeals had in mind when it sought to exempt this case from the rule applied in *Fong Foo* and *Sanabria*, there is no genuine basis upon which to distinguish the circumstances that led to the acquittals in this case from the circumstances that led to the acquittals in those cases. Put simply, and as Judge Nygaard correctly recognized, petitioner was likely the beneficiary of a jury instruction that was arguably erroneous. That mistake, however, does not permit a second trial and the Court of Appeals' decision to the contrary is in irreconcilable conflict with *Fong Foo* and *Sanabria*.

II. The Decision of the Court of Appeals Impermissibly Allows the Government to Impeach Adverse Verdicts in Criminal Cases, Creates a Test that a Defendant in a Criminal Case Can Never Satisfy, and Undermines the Concept of Finality

The means by which the Court of Appeals allowed the government to avoid the verdict in the Pennsylvania case represents an unprecedented rejection of the established principle that jury verdicts are generally not subject to impeachment. As this Court recognized several years ago in *United States v. Powell*, 469 U.S. 57 (1984):

> with few exceptions, see *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 556 (1984); *Smith v. Phillips*, 455 U.S. 209 (1982), once a jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see *McDonald v. Pless*, 238 U.S. 264 (1915); Fed.Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, the element of needed finality.

Id. at 67. This principle of law has been applied by this Court for over a century to bar inquiry into the deliberative process through which legal instructions were applied by jurors and a verdict was reached. *Sparf v. United States*, 156 U.S. 51, 80 (1895) ("'[I]n practice, the verdict of the jury, both upon

law and fact, is conclusive; because, from the nature of the proceeding, there is no judicial power by which the conclusion of law thus brought upon the record by that verdict can be reversed, set aside, or inquired into'") (quoting from *Commonwealth v. Anthes*, 71 Mass. 185 (Mass. 1855)).

As Judge Nygaard concluded, allowing the government to use the jury's unanimity question and district court's supplemental instruction to attack the validity of the Sodano verdicts violated this rule. (310 F.3d at 144; App. 14a) (Nygaard, J., dissenting). The jury's question and the district court's answer bore directly on the mental process through which the verdicts in the Pennsylvania trial were reached. This is an area that the courts have generally declared off-limits; at least in those instances in which it is the defendant seeking to avoid the verdict. *E.g.*, *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979). *D'Angelo* is instructive because it involved what could be described as the flip-side of the fact pattern in this case. The defendant sought there to overturn his conviction by arguing that a note from the jury suggested that it misapplied the law. The Court of Appeals rejected this argument because the "attack on the verdict is . . . an attempt to use the jury's note to probe its process of deliberation and find out how and why the jury reached its verdict. That is one form of attack on a verdict that has always been forbidden in Anglo-American criminal law." *Id.* at 1003. Indeed, the courts have prohibited defendants from attempting to evade a verdict based upon evidence that the jury was not unanimous; something that the government was allowed to do here. *United States v. Homer*, 411 F. Supp. 972, 978 (W.D. Pa.), *aff'd*, 545 F.2d 869 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

The implications of the special dispensation granted to the government in this case are potentially staggering. If, as the Court of Appeals decided, evidence that the jury was incorrectly charged on the unanimity requirement permits a retrial, then so too would evidence that the jury was incorrectly instructed on an essential element of the offense or some other material matter. This, in turn, will render the principle that the government may not appeal following an acquittal essentially a dead letter because appellate review will not be needed at all. The prosecutor will simply point to the mistake which arguably prompted the acquittal, assert that the existence of the mistake prevents the defendant from carrying his burden of proving that a valid and final judgment was entered in his favor, and then reprosecute the defendant for the same or related offenses. The decision of the Court of Appeals is thus the legal equivalent of the key to Pandora's box.

The unjustness of this situation becomes particularly acute once it is recognized that the Court of Appeals crafted a test that neither petitioner nor any other defendant can ever satisfy. According to the Court of Appeals, petitioner would have to show that the jury unanimously decided that the government failed to prove the Sodano murder and conspiracy charges before he could bar relitigation of those offenses through application of collateral estoppel. The only means by which he could discharge this burden, however, would be through the presentation of testimony from the jurors in the Pennsylvania case concerning their deliberations and the manner in which the verdicts were reached. If he tried to present such testimony, the prohibition set forth in Fed. R. Evid. 606(b) against the admission of evidence from a juror concerning deliberations would come into play and he would be precluded from offering the proof that he needs

to carry his burden.[6] The Court of Appeals has therefore placed petitioner into a legal Catch-22; to bar a retrial he has to prove that the jury was unanimous but the rules of evidence do not allow him to present testimony or affidavits from the jurors on that very issue. It is difficult conceive of a test that would be more unfair to a defendant or skewed in favor of the prosecution.[7]

---

6. Fed. R. Evid. 606(b) provides in pertinent part as follows:

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to a matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. . . .Nor may a juror's affidavit or evidence . . . be received for these purposes.

7. To the extent that the government suggests that petitioner brought this state of affairs upon himself by allowing the district court to give the arguably erroneous unanimity instruction to the jury, *Sanabria* would dispose of that claim as well:

> The Government's real quarrel is with the judgment of acquittal. While the . . . evidence was erroneously excluded, the judgment of acquittal produced thereby is final and unreviewable. Neither 18 U.S.C. § 3731 nor the Double Jeopardy Clause permits the Government to obtain relief from all of the adverse rulings – *most of which result from defense motions* – that lead to the termination of a criminal trial in the defendant's favor. To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice is based, and would vitiate one of the fundamental rights established by the Fifth Amendment.

437 U.S. at 77-78 (emphasis added; internal citations omitted).

And lastly, the decision of the Court of Appeals seriously undermines the principle of finality upon which *Powell* and Rule 606(b) are based. The trial of the Pennsylvania case lasted four months and involved a tremendous expenditure of time and effort by the district court, prosecution and defense counsel, the defendants, and the jurors. After the verdicts were returned, final judgments were entered and all of the defendants were sentenced to varying terms of imprisonment. Yet according to the Court of Appeals this was all for naught because the jury's unanimity question and the district court's answer make it impossible to determine whether the not proven verdicts on *any* of the predicate acts were unanimous and hence binding. Put differently, if petitioner can be retried on the Sodano predicate acts because the possibility exists that the jury was less than unanimous when it found that those charges were unproven, then the same is true for the other predicate acts ~~that~~ the jury also found were not proven. Indeed, shortly after the Court of Appeals issued its decision in this case the prosecutor advised the district court that he intended to obtain another superseding indictment and that the changes would be "more than superficial."[8] If finality means anything, it means that a defendant after having survived a trial should not be forced to repeatedly defend multiple criminal charges that the government has already been given an opportunity to prove. Because that principle is in jeopardy in this case, the Court should grant this petition.

---

8. The letter in which this statement was made was attached as an exhibit to a motion petitioner filed in the Court of Appeals to stay issuance of the mandate and is thus part of the record.

CONCLUSION

For any or all of the foregoing reasons, petitioner Joseph Merlino requests this Court to grant his petition for a writ of certiorari and review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

STEPHEN M. FELDMAN
Counsel of Record
CHRISTOPHER D. WARREN
1604 Locust Street
Philadelphia, PA 19103
(215) 546-2604

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED NOVEMBER 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4041

UNITED STATES OF AMERICA,

v.

JOSEPH MERLINO
a/k/a
SKINNEY JOEY

Joseph Merlino,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 01-cr-00197-1)
District Judge: Honorable Dickinson R. Debevoise

Argued on March 21, 2001

Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

(Opinion filed November 8, 2002)

Appendix A

OPINION OF THE COURT

ROTH, Circuit Judge:

Appellant Joseph Merlino has been charged in the District of New Jersey with advancing a racketeering enterprise, the Philadelphia La Cosa Nostra Family, by participating in the murder of Joseph Sodano. Merlino claims that his indictment violates the principle of collateral estoppel embodied in the Double Jeopardy Clause because another jury has already found that he did not participate in Sodano's murder. We conclude that, under the unusual circumstances of this case, Merlino cannot prove that the jury decided in his favor when they checked the "Not Proven" boxes corresponding to the Sodano murder racketeering acts. Merlino is, therefore, foreclosed from invoking collateral estoppel to bar his prosecution under the New Jersey indictment. We will, therefore, affirm the order of the District Court, denying Merlino's motion to dismiss the indictment.

I. Factual and Procedural History

This case is the tale of two indictments, one in Pennsylvania and one in New Jersey. A multi-defendant, multi-count trial took place in the United States District Court for the Eastern District of Pennsylvania. Merlino was convicted, among other offenses, of two Racketeer Influenced and Corrupt Organizations Act (RICO) counts. In Count I, Merlino was charged with conspiring from March 1, 1990, to March 30, 2000, to participate in the affairs of an enterprise, the Philadelphia La Cosa Nostra Family, through a pattern of racketeering activity in violation of 18 U.S.C.

§ 1962(d). In Count II, he was charged with participating in the affairs of the Philadelphia La Cosa Nostra Family during the same period in violation of § 1962(c). Specifically, the government accused Merlino of violating §§ 1962(c) and (d) by committing twenty-one racketeering acts. Those acts included conspiring to murder and murdering a former member of the La Cosa Nostra, Joseph Sodano. The jury in the Pennsylvania trial found that Merlino had committed six of the racketeering acts charged against him under Count I and five of the racketeering acts under Count II. As for the remaining racketeering acts, including the murder of Joseph Sodano, the jury indicated on the verdict sheet that they were "Not Proven."

The government alleges that, despite the checking of "Not Proven" on the special verdict sheet, the jury's actual finding as to the Sodano murder is not clear because the instructions given to the jury by the District Court, in answer to a jury question during deliberations, permitted the jury to violate its unanimity instruction.

To understand the government's argument, it is helpful to review the relevant parts of the District Court's instructions to the jury. When the case was submitted to the jury, the jurors were given special interrogatories to assist them in determining whether each of the defendants was guilty of the RICO offenses charged in the indictment. The judge referred to the special interrogatories and instructed the jury that:

> For each defendant you must *unanimously agree* as to the identity of *two racketeering acts*

or *one collection of unlawful debt* which the defendant agreed that someone would commit. On the verdict sheet I will give you, you should indicate whether you find a racketeering act or a collection of unlawful debt to be proven beyond a reasonable doubt or not proven.

And, the allegations from the indictment are there, directs you to the count, and then says, proven or not proven. And you will discuss and determine whether or not — and you'll check off which it is. If you check off not proven, not proven, not proven, not proven, each one you have to consider separately, each act.

* * *

When you review the indictment, you will see that the Government has alleged that the defendants carried out the RICO offenses charged in Counts 1 and 2 through 36 racketeering acts, 6 racketeering acts that involve acts of murder, attempted murder, or conspiracy to murder, 18 racketeering acts involving extortion in violation of State and Federal law, 3 racketeering acts involving gambling violations, 6 racketeering acts involving receipt of stolen property and 2 racketeering acts involving distribution of cocaine.

(emphasis added).

Thus, the jury was instructed that it must *unanimously* agree that a racketeering act or collection of unlawful debt was either proven or not proven. In addition, the jury was told that, to find a defendant guilty of a RICO offense, it must agree that he had committed at least two racketeering acts or one collection of unlawful debt. Furthermore, as the judge explained, *unanimous* agreement on more than two racketeering acts per defendant would not be necessary for a guilty verdict on a RICO count as to that defendant.

Two days after the jury began its deliberations, it submitted the following question to the District Court:

> Racketeering Acts. Once we determine that the defendant has committed one unlawful collection of debt or two or more racketeering acts, do we need to decide proven or not proven on all the racketeering acts?

The judge responded, "Yes."

Two days later, the jury requested additional clarification on this issue. It sent a note asking:

> If, on a given racketeering act that has no bearing on the count decision we cannot come to a unanimous decision, is it within the law to unanimously decide that the act is "not proven"?

Over the objections of the government, the judge again told them, "Yes."

The jury ultimately returned its verdict. On Merlino's verdict sheet, the jury found Merlino's participation in six racketeering acts under Count I and five acts under Count II to have been "Proven." The remaining racketeering acts, including the Sodano murder, were checked by the jury as "Not Proven." The government argues that the supplemental instructions allowed the jury to mark the special verdict "Not Proven" as to Merlino's involvement in Sodano's murder even though we have no idea of the actual jury vote on that count. Indeed, we do not know if the jury had unanimously found Merlino's participation in the Sodano murder acts to be "Not Proven" prior to the supplemental instructions or if, after the supplemental instructions, despite a vote count of anywhere from 11 to 1 for acquittal to 11 to 1 for conviction, the jury decided to mark those acts "Not Proven."

Soon after the Pennsylvania trial, the government charged Merlino, in the United States District Court for the District of New Jersey, with violating other provisions of RICO under 18 U.S.C. §§ 1959(a)(5) and 1959(a)(1) and (2), the so-called "VICAR" offenses which prohibit the commission of violent crime in aid of racketeering. In the New Jersey indictment, the government again charged Merlino with conspiring to murder Joseph Sodano and aiding and abetting in that murder, in violation of §§ 1959(a)(1), (2), and (5). In a pre-trial motion, Merlino moved to dismiss this new indictment, arguing it was barred by the special verdict of the Pennsylvania jury and the doctrine of collateral estoppel. After the District Court denied his motion, Merlino appealed.

Appendix A

II. Standard of Review

Since collateral estoppel as a bar to reprosecution is a component of the Double Jeopardy Clause and is an issue of law, our review is plenary. *See United States v. Smith*, 82 F.3d 1261, 1265-66 (3d Cir. 1996)

III. Jurisdiction

The District Court had subject matter jurisdiction after a grand jury indictment pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction over the pre-trial order pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See United States v. Abney*, 431 U.S. 651 (1977).

IV. Discussion

The Double Jeopardy Clause of the Fifth Amendment protects an accused from successive prosecutions for the same offense. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977). This case does not implicate that traditional bar against successive prosecutions because Merlino has been accused of two separate offenses. In the first trial Merlino was convicted of violating RICO pursuant to 18 U.S.C. § 1962(c) and (d). In the indictment before us now, however, he is charged with violating 18 U.S.C. § 1959, which prohibits the commission of violent crime in aid of racketeering. Because that VICAR offense requires proof of an element that the RICO offense does not, and vice-versa, they are different offenses for the purposes of the Double Jeopardy Clause. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The Double Jeopardy Clause, however, also embodies principles of collateral estoppel that can bar the relitigation of an issue actually decided in a defendant's favor by a valid and final judgment. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Merlino argued to the District Court, and argues again before us, that these principles require the dismissal of his New Jersey indictment because the Pennsylvania jury had entered a valid and final judgment, acquitting him of Sodano's murder.

The District Court denied Merlino's motion to dismiss the indictment. It held that collateral estoppel did not apply because the Pennsylvania District Court's instructions to the jury made it impossible to determine whether the jury unanimously acquitted Merlino of involvement in Sodano's murder. Indeed, one cannot tell if the vote "Not Proven" was unanimous or if it represented a split decision which might in fact not even have been a majority vote for "Not Proven." Merlino contends that the District Court's ruling was erroneous because the principles of collateral estoppel enunciated by the Supreme Court in *Ashe v. Swenson* do not require him to prove that he was unanimously acquitted. He also argues, in the alternative, that he can prove he was unanimously acquitted. We conclude, however, that the District Court properly dismissed Merlino's motion. To claim the benefit of collateral estoppel he must prove that the Pennsylvania jury unanimously acquitted him of participation in Merlino's murder. He cannot meet that burden.

Appendix A

A.

In *Ashe v. Swenson* the Supreme Court held that the Double Jeopardy Clause prohibits relitigation of an issue when the jury has decided that issue in a defendant's favor by a "valid and final judgment." *Id.* at 443; *accord United States v. Console*, 13 F.3d 641, 664 (3rd Cir. 1993). A "final judgment" in favor of a criminal defendant is an acquittal, *United States v. Lanoue*, 137 F.3d 656 (1st Cir. 1998), and an acquittal, in order to bar future litigation, must be unanimous; a "hung jury" does not bar future prosecutions. *See Illinois v. Somerville*, 410 U.S. 458, 463 (1973). Because a criminal defendant bears the burden of proving that the litigation of an issue is foreclosed, *Dowling v. United States*, 493 U.S. 342, 350-1 (1990); *United States v. Console*, 13 F.3d at 665, n. 28, it follows, under circumstances in which a unanimous vote is required, that the defendant can claim the benefit of collateral estoppel only if he can prove that the jury vote was in fact unanimous.

In order to demonstrate a unanimous vote, the face of a verdict sheet may not alone be sufficient. For example, in *Ashe*, the Supreme Court held that when a defendant claims a general verdict forecloses litigation of an issue, he must demonstrate that the issue was actually decided, not just by referring to the verdict itself, but by examining "the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter." *Ashe*, 397 U.S. at 443. *See also Schiro v. Farley*, 510 U.S. 222, 232-36 (1994). Jury instructions are part of that analysis. *See e.g., United States v. Marino*, 200 F.3d 6, 8-11 (1st Cir. 1999) (rejecting defendants' collateral estoppel arguments because "their jury charge contained considerable ambiguity.").

Although the cases we cite above involved general verdicts, we reject the contention that the type of verdict changes the defendant's burden. Whether the verdict was general or special, the defendant bears the burden of proving the issue he wants to foreclose was decided in his favor. *See, e.g., Dowling v. United States*, 493 U.S. at 350-51 (stating that the defendant had the burden to prove a general verdict decided the issue in its favor); *United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1995) (stating a jury's special verdict must necessarily resolve an issue in the defendant's favor before collateral estoppel can apply.). *See also United States v. Console*, 13 F.3d at 664 (same).

B.

Applying these rules to the case before us, we hold that, despite the notations on the special verdict sheet, Merlino cannot prove that the jury unanimously, or even by a majority, acquitted him of participation in Sodano's murder, and thus he cannot foreclose litigation of that issue. On the special verdict sheet, the Pennsylvania jury checked the "Not Proven" boxes corresponding to the Sodano murder. Because, however, of the supplemental instructions given by the District Court, those check marks are ambiguous. They do not demonstrate that the jury unanimously found that the Sodano murder was "Not Proven."

As we set out in Section I above, after five days of deliberations, the Pennsylvania jury asked the court to clarify its instructions. The jury sent a note inquiring, "If, on a given

racketeering act that has no bearing on the court decision we cannot come to a unanimous decision, is it within the law to unanimously decide that the act is 'not proven'?" Over the objections of the government, the judge responded "Yes." That instruction makes the jury's vote ambiguous because we cannot tell from the face of the verdict sheet whether the vote was unanimously "Not Proven" or whether the jury unanimously decided that they were unable to reach a unanimous decision as to "Proven" or "Not Proven," *i.e.*, whether they were "hung" on that issue.

Only the first of these interpretations of the jury note would bar the current case against Merlino because only the first is a unanimous acquittal and only the first resolves the issue Merlino wants to preclude from consideration in the New Jersey prosecution. The second interpretation of the note is not a unanimous acquittal and therefore is not a final judgment in favor of the defendant. Because Merlino cannot prove which is the actual jury vote, he cannot preclude the issue of his participation in the Sodano murder.

C.

Merlino challenges our conclusion on two grounds. First, he claims that the jury's verdict is unambiguous regardless of the trial court's instructions. He contends that the jury was essentially instructed that its lack of unanimity could prove reasonable doubt, and then applied that instruction by unanimously deciding that the act was "not proven." If this were the only possible interpretation of the jury's special verdict, we would agree with Merlino. It is not, however, the only interpretation. As discussed above, the trial court's

instructions could also be interpreted to allow the jury to check the "not proven" box if the jury agreed that it could not reach a unanimous conclusion on "Proven" or "Not Proven." Because of this ambiguity, Merlino fails to prove that the issue he wants to foreclose was decided in his favor by the Pennsylvania jury.

Merlino also contends, despite any ambiguity, that the special verdict is a valid and final judgment. He denies that the verdict in a criminal case must be a unanimous acquittal before it precludes future litigation. He asserts that any judgment is final if it is rendered by a court of competent jurisdiction and if it is "procedurally definite," leaving nothing more for the jury to do. To support his claim, he cites *Fong Foo v. United States*, 369 U.S. 141 (1962), and *Sanabria v. United States*, 437 U.S. 54 (1978), which hold that an erroneous jury instruction does not make an acquittal non-binding for collateral estoppel purposes. He argues that these cases contradict a holding that collateral estoppel is not applicable here.

Those cases do not, however, address the question whether an acquittal must be unanimous to have preclusive effect. They consider other issues not relevant here. In *Fong Foo*, the Supreme Court held that the 5th Amendment's Double Jeopardy clause barred further prosecution of a defendant who was acquitted even though the acquittal was based on an "egregiously erroneous foundation." 369 U.S. at 142-43. In *Sanabria*, the Court made a similar holding: an acquittal based on an erroneous evidentiary ruling barred further prosecution of the defendant for the same offense. 437 U.S. at 68-69.

These cases hold that an erroneous legal foundation does not alter the binding affect of a unanimous acquittal. They do not alter the rule that a "hung jury" does not bar future litigation. *See Johnson v. Louisiana*, 406 U.S. 356, 363 (1972). *Fong Foo* and *Sanabria* do not, therefore, affect our decision. Our holding rests on Merlino's inability to prove he was unanimously acquitted, not on the accuracy of the trial court's instructions. He, thus, could not claim the benefit of collateral estoppel.

V. Conclusion

For the above stated reasons, we will affirm the District Court's denial of the motion to dismiss the indictment and we will remand this case for further proceedings.

Appendix A

NYGAARD, Circuit Judge, dissenting.

The issue on appeal is whether we must accept the jury's finding of "Not Proven" on its face, or whether we are empowered to look behind its finding and conclude that it is not clear whether the jury actually reached a unanimous decision on this critical predicate act. I must respectfully dissent because I believe that, under the doctrine of collateral estoppel, the predicate acts that the jury decided were "Not Proven" cannot be re-litigated. I therefore conclude that the District Court should have dismissed the charges.

The government argues that because of the two supplemental instructions given to the jury in response to the jury's questions, we cannot be sure if the jury truly reached a unanimous decision on the murder-based predicate acts. I submit that looking behind jury verdicts to reconstruct the jury's thinking, or attempting to determine how it may have reached consensus, is pure speculation and contravenes our fundamental constitutional heritage of treating jury verdicts as unimpeachable. The government claims that because of the judge's supplemental instructions, the jury probably was not unanimous when it found that the government failed to prove the murder-based predicate acts. But we do not know how the jury voted after the judge issued the second supplemental instruction, and we should not pretend that we do. We only know that it decided that this predicate act was not proven.

In *Ashe v. Swenson*, the Supreme Court held that when a defendant claims a general verdict forecloses litigation of an issue, he must demonstrate that the issue was actually decided

by examining "the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter." 397 U.S. 436, 444 (1970). However, the Court specifically based its holding on a situation "[w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case." *Id.* That holding makes sense for a general verdict, where it is difficult to determine which particular facts the jury actually decided. It makes no sense when we have a special verdict and we know exactly what the jury concluded. Here, the special verdict form clearly indicates how the jury resolved each issue. Put simply, the jury decided that the predicate acts were "Not Proven." I would accept that verdict as the jury's adjudication of the murder charges, and prohibit that issue from being raised against Merlino again.

The government argues that Merlino bears the burden of proving that the issue he wants to foreclose was decided in his favor, whether the verdict was general or special. I conclude that he has done just that. Moreover, the case that the government cites for support does not determine the issue. *United States v. Console*, upon which the District Court relied, involved a hung jury. 13 F.3d 641, 664 (3d Cir. 1993). In *Console*, we explained that "a response to a special interrogatory regarding an element of a 'hung' count is neither a 'final' judgment nor a determination 'necessary' to a final judgment." *Id.* Here, however, the jury was not "hung." It returned a verdict. We have a final judgment.

The jury's decision on the murder-based predicate acts was the functional equivalent of a verdict on the stand-alone murder charge. *Apprendi v. New Jersey* holds that any fact

that has the effect of increasing the maximum penalty permitted by law is an element of the offense, which must be submitted to a jury and proven beyond a reasonable doubt. 530 U.S. 466, 476 (2000). If the jury had found that the murder-based predicate acts were proved, then Merlino could have faced life imprisonment. The government was therefore obligated to prove a predicate act of murder beyond a reasonable doubt. Because a favorable verdict for the government on racketeering acts 4A and 4B would have been tantamount to a conviction for the Sodano murder and conspiracy offense, the converse should be true: the "Not Proven" verdicts should be treated as acquittals for collateral estoppel purposes.

The District Court rejected this *Apprendi* reasoning because "[t]he sentencing consequences flow from the racketeering acts that were Proven" and that "[t]o give similar weight to the Not Proven acts is unjustified." But the District Court's rationale leads to inequities. Following its logic, as long as the government fails to prove verdicts on certain predicate acts, it could continue to use those predicate acts in other RICO prosecutions until they are "Proven." The defendant would be forced to prove his innocence of that charge repeatedly. Yet the purpose of the Double Jeopardy Clause and collateral estoppel is to protect defendants from having to face serial trials for the same offense.

Appellee's argument boils down to this: the District Court gave an erroneous jury instruction that theoretically could have permitted the jury to say it was unanimous when it really was not. But, this argument goes nowhere. An acquittal may not be overturned based on "an egregiously

erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Sanabria v. United States*, 437 U.S. 54, 74 (1978) ("there is no exception permitting a retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' the legal rulings leading to that judgment might be").

The general principles underlying the Fifth Amendment's Double Jeopardy Clause are designed to ensure that the defendant does not have to face the burdens and hazards of trial again and again, especially when the government has obtained the benefit of a "dry run." Here, the defendant should not be punished for a quirky, and perhaps erroneous, jury instruction. I would therefore reverse.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4041

UNITED STATES OF AMERICA,

v.

JOSEPH MERLINO
a/k/a
SKINNEY JOEY

Joseph Merlino,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 01-cr-00197-1)
District Judge: Honorable Dickinson R. Debevoise

Argued on March 21, 2001
Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on March 21, 2002;

On consideration whereof,

Appendix A

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated October 15, 2001, be and the same is hereby affirmed insofar as the denial of the motion to dismiss the indictment and we will remand this case for further proceedings.

All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

Dated: November 8, 2002

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED OCTOBER 16, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 01-197

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH MERLINO,
aka "Skinny Joey"
VINCENT "Beeps" CENTORINO,
DANIEL D'AMBROSIA, JOSEPH SERVIDIO,
RAYMOND "Frenchie" LEPORE, EUGENE "Little Gene"
WILSON, DOMINICK "Tommy" DINORSCIO,
ANTHONY PROTO, THOMAS DEMICHAEL
and WAYNE CROSS

OPINION

Debevoise, *Senior District Judge*:

Defendant, Joseph Merlino, has moved to dismiss Counts 17 and 18 of the superseding indictment in this case on the grounds of former jeopardy and collateral estoppel. The motion raises the question whether a defendant who was convicted on RICO charges in an earlier proceeding may

subsequently be tried for conduct listed among the RICO predicate acts which, in response to special interrogatories, the jury found to be "Not Proven."

Defendant and others were charged with RICO and other offenses in the Eastern District of Pennsylvania (the "Eastern District Case"), *United States v. Joseph Merlino, et al.*, Crim. Docket No. 99-363. In the Eastern District case, count one of the indictment (the "Philadelphia Indictment") charged defendant with conspiring from March 1, 1990 to on or about March 30, 2000 to participate in the affairs of an enterprise, the Philadelphia La Cosa Nostra Family, through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d) (the "RICO conspiracy"). Count two of the Philadelphia Indictment charged defendant with participating in the affairs of the Philadelphia La Cosa Nostra Family during the same time period alleged in Count One through the commission of a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) (the "RICO substantive violation").

The RICO conspiracy charge alleged that the defendants in the Eastern District case agreed to commit 36 predicate acts of racketeering. Pertinent to the present motion are two predicate acts that involved the murder of Joseph Sodano and defendant's role in that offense. The government alleged:

RACKETEERING ACT FOUR
(Murder of Joseph Sodano)

19. The defendant named below committed the following acts of racketeering with respect to the

murder of Joseph Sodano, either one of which constitutes the commission of Racketeering Four.

Racketeering Act 4A
Conspiracy to Murder Joseph Sodano

a. From in or about Autumn, 1996 up to on or about December 7, 1996, in the District of New Jersey and elsewhere,

Joseph Merlino
aka "Skinny Joey"

defendant herein, did commit an act involving murder, that is, with the intent of promoting and facilitating the commission of the crime of murder, did unlawfully and feloniously conspire and agree with co-conspirator Ralph Natale, co-conspirator Peter Caprio, aka "Pete the Crumb" (charged elsewhere and not in this indictment) and various other co-conspirators known and unknown to the Grand Jury, to murder Joseph Sodano and did an overt act in furtherance thereof in violation of the laws of the State of New Jersey, that is New Jersey Statutes Annotated 2C:5-2 and 2C:11-3.

Racketeering Act 4B
Murder of Joseph Sodano

b. On or about December 7, 1996 in Newark, New Jersey, in the District of New Jersey and elsewhere,

Appendix B

Joseph Merlino
aka "Skinny Joey"

> defendant herein, together with Ralph Natale, Peter Caprio, aka "Pete the Crumb" (charged elsewhere but not in this indictment) and others known and unknown to the Grand Jury, did commit an act involving murder that is, did purposely and knowingly cause the death of Joseph Sodano, in violation of New Jersey Statutes Annotated, 2C:11-3.

To prove the charges involving Sodano the government relied primarily on the testimony of Ralph Natale and Peter Caprio, who testified that Sodano was killed on orders from Natale and Merlino because he had refused to travel to Philadelphia to meet with Natale. Defendants in that case produced evidence to support their claim that Sodano was murdered as part of a robbery.

When the case was submitted to the jury the jurors were given special interrogatories which required them to determine whether each of the defendants was guilty of the RICO offenses charged in counts one and two of the Philadelphia Indictment.

During the course of his jury instructions the judge referred to the interrogatories on several occasions.

> For each defendant you must unanimously agree as to the identity of two racketeering acts or one collection of unlawful debt which that defendant agreed that someone would commit. On the

verdict sheet I will give you, you should indicate whether you find a racketeering act or a collection of unlawful debt to be proven beyond a reasonable doubt or not proven.

And, the allegations from the indictment are there, directs you to the count, and then says, proven or not proven. And, you will discuss and determine whether or not — and you'll check off which it is. If you check off not proven, not proven, not proven, not proven, each one you have to consider separately, each act. (Tr. at 46).

. . .

That completes my instructions on the elements of RICO and RICO conspiracy as charged in Counts 1, 2, 3 and 4. I will instruct you on the specific racketeering acts that the Government has charged in Counts 1 and 2 now.

When you review the indictment, you will see that the Government has alleged that the defendants carried out the RICO offenses charged in Counts 1 and 2 through 36 racketeering acts, 6 racketeering acts that involve acts of murder, attempted murder or conspiracy to murder, 18 racketeering acts involving extortion in violation of State and Federal law, 3 racketeering acts involving gambling violations, 6 racketeering acts involving receipt of stolen property and 2 racketeering acts involving distribution of cocaine.

Appendix B

> I'll explain later in this instruction about the law applicable to these 36 racketeering acts. As I've already instructed you, you will be asked to determine whether the Government has proved each of these racketeering acts beyond a reasonable doubt with respect to each defendant charged in each act. Keep in mind that the Government must prove the essential elements of each racketeering act beyond a reasonable doubt. (Tr. at 54-55)

> When you start your deliberations tomorrow, each of you will have a copy of the verdict form for each of the defendants in a packet under a clip like this, so that you can all, as you're discussing the charges against each individual defendant, you can all reference the same count — it starts off with Count 1 and it has the racketeering acts that they're charged with, and goes on and on and on and on. And, it says, proven, not proven. And, you can discuss each of the charges against each of the defendants and determine your verdict in that organized fashion. (Tr. at 95-96).

During deliberations the jury sent the following question to the judge:

> If, on a given racketeering act that has no bearing on the count decision, we cannot come to a unanimous decision, is it within the law to unanimously decide the act is "not proved".

After hearing the government's contention that the answer should be "no" because otherwise in the event of a

reversal and retrial "we would have a . . . arguably have a jury preclusion on a particular racketeering act" (Tr. at 4) and after hearing defense counsels' contention that the answer should be "yes", the judge decided on a "yes" answer.

When the jury returned a verdict, it found defendant guilty on Count One (racketeering conspiracy) and count two (racketeering substantive offense). On defendant's verdict a number of racketeering acts were found to have been proven and a number were found to have been Not Proven. Among the latter were:

Racketeering Act Four A Conspiracy to Murder Joseph Sodano, in violation of laws of the State of New Jersey, that is N.J. STAT. ANN. 2C:5-2 and 2C:11-3.	_____ Proven	X Not Proven
Racketeering Act Four B Murder of Joseph Sodano, in violation of laws of the State of New Jersey, that is N.J. STAT. ANN. 2C:11-3.	_____ Proven	X Not Proven

Shortly after the jury rendered its verdict in the Eastern District case, the government obtained a superseding indictment in the instant multi-defendant organized crime case.

Count 17 of the superseding indictment filed on August 27, 2001 charged defendant with a violent crime in aid of racketeering ("VICAR"), that is, conspiring from at least January 1994 up to and including March 26, 2001 with Vincent Centorino and others to murder Joseph Sodano in

violation of N.J. Stat. Ann. §§ 2C:11-3 and 2C:5-2 for the purpose of gaining entrance to and maintaining and increasing the position of the North Jersey crew of the Philadelphia Crime Family, an enterprise engaged in racketeering activity, all in violation of 18 U.S.C. § 1959(a)(5).

Count 18 of the superseding indictment charged defendant from at least January 1994 up to and including December 7, 1996 with aiding and abetting the murder of Joseph Sodano in violation of N.J. Stat. Ann. §§ 2C:11-3 and 2C:2-6, for the purpose of gaining entrance to and maintaining and increasing his position in the same enterprise, all in violation of 18 U.S.C. §§ 1959(a)(1) and (2).

Defendant moves to dismiss Counts 17 and 18 on the grounds that they are barred by principles of double jeopardy and collateral estoppel, by virtue of the fact that the government was unable to convince a jury that defendant was guilty of the same conduct in the recently concluded Eastern District case.

The parties agree that the superseding indictment is not vulnerable to attack on the more typical double jeopardy grounds — prior conviction or acquittal of the same offense. RICO and VICAR charges are not for the same offense under double jeopardy principles. They have different elements and thus under *Blockburger v. United States*, 284 U.S. 299 (1932) are not subject to double jeopardy attack. A VICAR offense requires proof of a motive element that a violent crime be undertaken either "as consideration for a promise or agreement to pay anything of pecuniary value from an enterprise . . . or for the purpose of gaining entrance to or maintaining

or increasing position in an enterprise." 18 U.S.C. § 1959(a). This motive element is not an element of either a RICO substantive or RICO conspiracy offense. Prosecution for the VICAR offense in this court and for the RICO offense in the Eastern District case does not violate the Double Jeopardy Clause even if they are premised upon the same conduct.

The case of *United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990) appears to be dispositive of the strict double jeopardy issues. There the court faced the question whether acquittal on a RICO charge barred subsequent prosecution on the predicate acts. Esposito had been acquitted on charges of RICO conspiracy and participation in a racketeering enterprise. Four drug offenses were charged as predicate acts.

After the acquittal the government indicted Esposito alleging drug distribution on three separate dates. The government conceded that the drug counts were based on the transactions that supported the predicate acts charged in the earlier indictment. Esposito moved to dismiss the second indictment, claiming that it violated principles of double jeopardy and collateral estoppel. The district court denied the motion and Esposito appealed pursuant to the collateral order exception to the final judgment rule.

The Court of Appeals noted that "[t]he Supreme Court has recently reiterated the now familiar statement that under the Double Jeopardy Clause of the Fifth Amendment, defendants are protected from later prosecutions for the same offense after being convicted, from later prosecutions for the same offense after being acquitted, and from multiple punishments for the same offense." *Esposito*, 912 F.2d at 63.

Appendix B

Turning first to the question whether Congress intended that the RICO offense and the predicate acts be separate offenses, the Court stated:

> Esposito argues that the fact that Congress intended to permit a subsequent prosecution for RICO following an earlier prosecution for a predicate act does not signify that Congress also intended that a prosecution for the predicate act could follow a RICO prosecution. However, nothing in the legislative history suggests that Congress intended RICO to be a substitute for the predicate offense; instead, that history unequivocably demonstrates Congress saw RICO as a new and additional enforcement tool. *Cf. Garrett*, 471 U.S. at 784, 105 S. Ct. at 2414 (Congress intended to create a CCE offense separate from and in addition to the predicate offense).
>
> The purpose behind RICO was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."
>
> Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, *reprinted* in 1970 U.S. Code Cong. and Admin. News 1073. The broad purpose behind the Act supports

allowing two prosecutions irrespective of the order in which they are brought.

Esposito argues that his prosecution for the substantive drug offenses is barred because it fails the *Blockburger* test in that "there is no element of the offense unique to *both* prosecutions." Appellant's Brief at 17. The Supreme Court has explained that the *Blockburger* test was developed "in the context of multiple punishments imposed in a single prosecution." *Garrett*, 471 U.S. at 778-79, 105 S. Ct. at 2411. *See United States v. Boffa*, 688 F.2d 919, 938 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022, 103 S. Ct. 1272, 75 L.Ed.2d 494 (1983). The Court has recently stated that "[t]he *Blockburger* test is simply a 'rule of statutory construction,' a guide to determining whether the legislation intended multiple punishments." *Grady*, 110 S. Ct. at 2091.

Esposito's argument based on *Blockburger is* inapposite because his acquittal on the RICO charge precludes more than one punishment. Moreover, "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." See *Garrett*, 471 U.S. at 779, 105 S. Ct. at 2411. Thus, because we conclude that the statutory intent to make RICO a separate offense from the predicate acts is clear, *Blockburger* is inapplicable.

Esposito, 912 F.2d at 63-64.

Appendix B

Having decided that Congress intended to create separate offenses for the predicate acts and the substantive RICO charge, the Court addressed the question whether the predicate offense is the "same offense" as the RICO charge within the meaning of the Double Jeopardy Clause. In the present case the second prosecution is a VICAR offense, not a RICO offense, but similar considerations apply in determining whether there has been violation of Double Jeopardy principles. In *Esposito* the Court concluded:

> In sum, while the same evidence may be presented against Esposito in both trials, he was not prosecuted in *Accetturo* for the same conduct as that set forth in the indictment here, and hence *Grady* does not mandate a finding that this prosecution is barred by double jeopardy. A consequence of our conclusion that the prosecution for the RICO charge does not signify that defendant was prosecuted for the conduct constituting the predicate acts of racketeering activity, *See Grayson*, 795 F.2d at 282; *United States v. Phillips*, 664 F.2d at 1009 n.55, is that the two offenses may be the subject of successive prosecutions. See *United States v. Dunbar*, 591 F.2d 1190, 1192 (5th Cir. 1979) ("no court in this country has ever held that a defendant may not be indicted and tried once for a conspiracy and thereafter tried for the crime of distributing controlled substances"), *panel opinion adopted in relevant part*, 611 F.2d 985 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926, 100 S. Ct. 3022, 65 L.Ed.2d 1120 (1980). It follows that Esposito's

> argument that his prosecution for the predicate offenses is barred as a successive prosecution violative of the Double Jeopardy Clause must fail.

Esposito, 912 F.2d at 65.

Esposito, however, does not address the principal issue that defendant raises here. In the criminal case in which Esposito was first tried, all defendants, including Esposito, were found not guilty on the RICO charge. Therefore, there was no need for the jurors to address the question whether the government had proved some or all of the predicate acts. The verdict's predicate act questions were simply left unanswered. In the Eastern District case, on the other hand, defendant was found guilty of the RICO charge; the jury had to answer the predicate act questions; as to the two predicate acts concerning the Sodano murder, the jury ruled Not Proven. This, defendant contends, is equivalent to a jury verdict of acquittal on the Sodano murder charges, and principles of collateral estoppel bar the government from relitigating that issue.

Defendant notes that the finding of Proven or Not Proven can be, and in this case was, critical in the sentencing process, particularly in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490-91, 120 S. Ct. 2348, 2362-63 (2000). Any fact which has the effect of increasing the maximum sentence permitted by law must be submitted to the jury and proved beyond a reasonable doubt. The maximum penalty prescribed for RICO offenses is 20 years imprisonment, which can increase depending upon which predicate acts are charged and proven at trial. The effect of finding that the charge of murder against

defendant was Proven would be to increase his maximum penalty under RICO from 20 years to life imprisonment.

Another reason that defendant advances to find that the jury unanimously found that the Sodano murder charges against defendant were Not Proven is peculiar to this case. He cites the jury question that was posed during deliberations: "if on a given racketeering act that has no bearing on the count decision, we cannot come to a unanimous decision, is it within the law to *unanimously* decide the act is 'not proven.' " (emphasis added) Defendant contends that the judge's "yes" answer establishes that the jury agreed that each Not Proven answer was a unanimous decision.

Verdicts in criminal cases carry collateral estoppel effect. "Thus, even though the acquitted counts do not bar retrial on the mistried counts, they do bar relitigation of issues already resolved against the government." *United States v. Bailin*, 977 F.2d 270, 278 (7th Cir. 1992).

In *Ashe v. Swenson*, 397 U.S. 436 (1970) four masked armed men entered a home and robbed six men who were playing poker. Ashe was the first defendant brought to trial, and the indictment charged him with the robbery of only one of the six men. He was acquitted, and the state thereafter brought him to trial charging him with robbery of a different participant in the poker game. He appealed his conviction. The Supreme Court noted that the issue in dispute before the first jury was whether Ashe had been one of the robbers, and that by its verdict the jury had found he had not been. The Court reversed Ashe's conviction holding that the state cannot relitigate that issue again.

Appendix B

It is defendant's position that "the jurors' finding that the Sodano predicate acts were not proven constituted the functional equivalent of an acquittal" (Def.'s Br. at 10), and therefore the collateral estoppel element of the Double Jeopardy Clause precludes the government from a retrial of the Sodano murder charges.

Certain of the considerations that underlie the Double Jeopardy Clause prevail in the situation presented in this case. When the government alleges a racketeering act as part of its RICO charge, a defendant must fully defend the charge that he committed that act, particularly in a case such as the present one where a finding of Proven would dramatically increase the possible length of the defendant's sentence. If the jury finds the act Not Proven and the government indicts the defendant, not for a RICO violation, but for the act itself, defendant not only faces the burden of defending the same charge all over again, but he also must defend after having revealed his defense contentions and strategy at the previous trial. This will have given the government, with all its resources, the opportunity to investigate further and otherwise prepare to meet the defense case.

There are considerations that militate against giving double jeopardy protection to a defendant when a jury finds a racketeering act Not Proven. In the typical RICO case a number of racketeering acts are charged. There were thirty-six in this case. Only two needed to be found Proven to satisfy the predicate acts element of the RICO charge. It would be understandable, if not almost inevitable, that after a jury found that a requisite number of predicate acts had been Proven (six were Proven against defendant under Count One

in that case) they would be less likely to spend the required time and effort to deal as extensively with the remaining racketeering acts which might involve complex evidence and pose difficulties in reaching unanimous agreement. The jury is not aware of the significance racketeering acts play in the sentencing process and are instructed not to concern themselves with any punishment that might be imposed, because that is a matter for the court to decide. This is a reason not to treat racketeering acts found to be Not Proven as acquittals and to analogize the situation to a failure to reach a verdict. In such a case the government can retry the defendant and, of course, will have advance knowledge of the defendant's contentions and strategy.

The jury's note can be interpreted to mean that the jurors were divided on certain of the predicate acts. The judge's response of "yes" to their question could not convert division into unanimity. In any event I believe it is inappropriate to try to reconstruct the jurors' mental state.

Weighing the foregoing factors and considering analogous cases, I conclude that indicting defendant on charges arising out of the Sodano murder does not violate the Double Jeopardy Clause notwithstanding the Not Proven finding of the jury on the Sodano murder racketeering acts in the Eastern District case. The sentencing consequences flow from the racketeering acts that were Proven. To give similar weight to the Not Proven acts is unjustified. In dicta the Court of Appeals has stated:

> even if the district court had submitted the requested special interrogatories to the jury and

> the jury had indicated that certain predicate acts had not been established, Console's reprosecution under RICO based on these predicate acts would not have violated his double jeopardy rights.
>
> . . .
>
> But inasmuch as a response to a special interrogatory regarding an element of a "hung" count is neither a "final" judgment nor a determination "necessary" to a final judgment, such a response would not preclude the government from relitigating an issue. Thus, *even if the jury at the first trial had indicated that the predicate offenses on which the RICO counts rested had not been established, Console would have reaped no benefit from the doctrine of collateral estoppel* and the government would have been free to reprosecute the RICO counts based on these predicate offenses.

United States v. Console, 13 F.3d 641, 664-65 (3d Cir. 1993) (footnotes deleted) (emphasis added).

For the foregoing reasons defendant's motion to dismiss Counts 17 and 18 of the superseding indictment will be denied. The court will file an appropriate order.

s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

Dated: October 16, 2001

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC DATED DECEMBER 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4041

UNITED STATES OF AMERICA,

v.

JOSEPH MERLINO
a/k/a
SKINNEY JOEY
Joseph Merlino,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 01-cr-00197-1)
District Judge: Honorable Dickinson R. Debevoise

Argued on March 21, 2002

Before: NYGAARD, ROTH and AMBRO, *Circuit Judges*

Before: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AMBRO, BARRY, FUENTES, SMITH, *Circuit Judges*

Appendix C

ORDER

The petition for rehearing *en banc* filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: DEC 11 2002